No. 20,191

United States Court of Appeals

For the Ninth Circuit

JAMES BAUER TOLAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of Guam
for the unincorporated territory of Guam

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE

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JURISDICTION

The jurisdiction of the District Court of Guam of crimes occurring within the special maritime and territorial jurisdiction of the United States is pursuant to Section 1424(a), United States Code, and Section 7(3), Title 18, United States Code.

The jurisdiction of this Court is predicated upon Section 1291 and 1294, Title 28, United States Code and Section 1424(b), Title 48, United States Code.

STATUTES AND RULES INVOLVED

The Statutes and Rules involved are set out in the Appendix.

STATEMENT

This is an appeal from a conviction of guilty for the crime of Grand Theft resulting from a verdict of a jury.

The defendant, under the provisions of Title 18, Section 13, United States Code, was charged by Information for violating Section 484 and Section 487, Penal Code of Guam, pursuant to Title 18, Section 13, United States Code. The crime occurred on lands within the special maritime and territorial jurisdiction of the United States as defined by Title 18, Section 7, United States Code.

An Information was filed on January 19, 1965, in the District Court of Guam charging the Appellant and two others with the commission of the crime of Burglary and Grand Theft under Title 18, Section 13, United States Code (459, 484, 487, Penal Code of Guam). The joinder of offenses and defendants was pursuant to Rule 8, Federal Rules of Criminal Procedure. The Appellant, on February 12, 1965, filed a Motion for Severance of his trial from that of his co-defendants and to make the Information more definite and certain. The Motion, after a hearing before the Court on February 19, 1965, was denied.

The trial was then started on March 1, 1965, and during the course thereof, as a result of a question involving moral turpitude of a witness appearing for one of the other defendants, the Court instructed the jury to disregard the said question and answer for the reason that an attempt to impeach the witness was predicated upon a conviction of a lesser offense than

a felony. Subsequently, the Court dismissed the charge against that defendant in order to remove any taint of prejudice from the conduct of the trial. The jury retired to consider its verdict after the presentation of evidence. There is no record of the time the jury deliberated, but it was after approximately twelve hours that, upon inquiry by the Court, it reported, through its foreman, that it had arrived at a verdict as to Count I, but was unable to agree as to Count II. The Court thereupon requested the jury to retire and to prepare its verdict as to Count I. The jury returned a verdict of not guilty to the charge of Burglary. Upon further questioning, the jury reported, through its foreman, that it was hopelessly deadlocked and would be unable to agree upon a verdict as to Count II by further deliberation. The Court, thereupon, discharged the jury and declared a mistrial.

The retrial as to Count II (Grand Theft) was to jury. Efforts to select a jury began April 1, 1965. A jury panel was exhausted before a complete petit jury of twelve persons was selected. The Court continued the case for one week during which time additional talesmen were selected from which a complete jury was selected and the trial commenced on April 12, 1965. The jury found the defendant guilty. This appeal followed.

SUMMARY OF ARGUMENT

The offenses of Burglary and Grand Theft are separate and distinct, although they may, as in this case they did, arise from the same series of criminal acts. An acquittal as to one of the offenses does not

operate to create a bar to retrial of the other offense under principles of double jeopardy or res judicata where the original trial terminated without a verdict as to such offense by reason of the inability of the jury to agree.

Double jeopardy operates to bar a second trial where the offenses charged are identical or included, but not from the fact that separate charges arise from one wrongful act or that the evidence to prove both offenses is substantially the same. In the instant case, the elements of the separate offenses were present, although arising out of a single series of transactions, and were sufficient to establish the commission of each crime independently. Therefore, double jeopardy did not exist at the second trial.

Res judicata will not lie to bar a second trial where retrial is not on an issue necessarily determined in the first trial, as is often the case where the charges are for example, (1) to commit a crime and (2) to engage in a conspiracy to commit the crime. The circumstance of the present case is that two substantive charges were involved and independent evidence exists to establish the elements of each distinct crime. Acquittal as to one, therefore, does not merge into it the elements of the separate crime and Appellant may be retried as to the unresolved issue.

Review of the procedural aspects of the trial show that Appellant was not prejudiced in the conduct of his defense. The complaints of the Appellant as to the failure of the Court to sever his first trial from those of his co-defendants, the discharge of the jury without

polling and without his consent when it was unable to agree as to a verdict as to Count II and permitting a group of unsworn prospective jurors to separate while additional talesmen were selected was not abuse of discretion on the part of the trial judge.

The response of the trial judge to a situation created by a seemingly improper question to the witness for another defendant was sufficient under the circumstances to protect Appellant and insure him a fair trial. In addition, such incident was not a factor in determining the fairness of the second trial, at which he was convicted.

The substantive questions must be resolved against the Appellant. And, in the absence of showing of a prejudicial influence attaching to the Appellant by reason of the exercise by the Court of its discretion, or that the response of the Court to prejudicial incident concerning another defendant was insufficient to protect the right of Appellant and insure him a fair trial his procedural complaints are without substance.

Therefore, the verdict should be affirmed.

ARGUMENT

I

TRIAL PROCEDURES AND CONDUCT OF ATTORNEY FOR PROSECUTION IN FIRST TRIAL AFFORDS INSUFFICIENT GROUNDS FOR REVERSAL.

Aside from the substantive issues involved, the Appellant places reliance upon procedural matters as grounds for the reversal of his conviction in the second trial. Briefly stated, these matters are:

1. The failure of the Court to sever Appellant's trial from that of the other defendants.
2. The conduct of the prosecution in reference to the other defendant in the first trial which allegedly operated to the detriment of the Appellant.
3. The discharge of the jury without the consent of the Appellant and without polling it as to its inability to agree as to a verdict on Count II of the Information.
4. The Court permitting partial jury to separate while additional jurors were summoned.

1. The failure of the Court to sever Appellant's trial from that of the other defendants.

The rule governing the joining of defendants is Rule 8(b) of the Federal Rules of Criminal Procedure. In this case, the circumstance is that the defendants participated jointly in a criminal transaction. The acts of each were different, one defendant being charged as the perpetrator of the crime and the Appellant being charged as a principal by reason of having aided and abetted its commission. However, their joint efforts had a common purpose and goal. Rule 8(b) provides for charging defendants jointly where it is alleged that they have participated in the same acts or transaction constituting the offenses for which they are charged. In *Rakes v. United States,* 169 F.2d 739, (CA 4th, 1948), Cert. denied 335 U.S. 826, 69 S. Ct. 51 the circumstance of the passive defendant who aids and abets rather than engages

directly in the perpetration of the act is discussed. That case found that a person who aids and abets, in conjunction with others, in some series of related transactions, may be joined in the indictment or information with his fellow participants. See also *Rutherbery v. United States,* 245 U.S. 480, 38 S. Ct. 168 (1918).

Here, notwithstanding the fact that the Appellant did not take or carry away property of another, the criminal activity, the basis of the information, was common to both defendants to which each had contributed his efforts to achieve success. The evidence at the trial showed no separate act or acts performed by the Appellant that were not related to the unlawful acquisition of the property of another and its disposal. In this respect, the crime for which the Appellant was tried was the same as that for which the co-defendant was tried.

The Appellant, here, raises the issue outside the purview of Rule 8(b) when he asserts his contention that the defendants were improperly joined because he was unable to raise some unknown objections to the desire of the counsel of his co-defendant to admit into evidence a prior statement made by a Government witness (Appellant's Brief, pp. 25-26). Appellant asks this Court to speculate upon what objections could have been made by his counsel and to assume that, because such possible objections were not made, he was prejudiced before the jury. The transcript, assuming the introduction of the statement would have been improper, amply shows the ability of the trial judge

to protect the interest of the Appellant, negating any presumption of prejudice because counsel was unable to make pertinent objections for fear of injuring the case of the co-defendant.

2. **The conduct of the prosecution in reference to another defendant which supposedly operated to the detriment of the Appellant.**

It is conceded that acts of prior misconduct on the part of the witness for the defense, not resulting in a conviction, may not be delved into on cross-examination in an attempt to impeach. In this case, propounding a question to the alibi witness for the defendant Ward in the first trial as to her conviction for prostitution, considering the circumstances that the conviction had been reversed, (a fact unknown to the prosecution) may have been improper.

However, in light of the judge's action of admonishing the jury to disregard the question and answer and, subsequently, to eliminate any possibility of a continuing taint of prejudice, dismissing the charges as to the defendant Ward, it is submitted that Appellant has failed to show any prejudice as to him. In fact, considering the jury's verdict as to Count I and its disagreement as to Count II in the first trial, we must agree with Appellant's argument that the effect of the incident upon the results of the trial is speculative. It is all too apparent, in view of the evidence of guilt presented in the first trial, the same evidence which resulted in a verdict of guilty in the second trial, that the jury must have resolved such speculation in favor of the Appellant.

It is conceded by the Appellant, that mere speculation as to the attitude of the first trial jury ought not to be the criteria for reversal or affirmance of the result of the second trial. The question is whether the alleged improper question affected the Appellant in the second trial. The witness, Palen, was present in the first trial to dispute the credibility of the Government's witness, Wansor, by testifying that Ward was at her home at the time Wansor had said Ward was with him engaging in the criminal conduct for which he was on trial. The Appellant was unaffected by her answer since it did not relate to his conduct. The fact that the Appellant was not affected by the witness, Palen's, testimony is substantially revealed by the fact that if such testimony had been important to establish his guilt or innocence it is logical to assume that he would have had her testify at the second trial.

3. The discharge of the jury without the consent of the Appellant and without polling it as to its inability to agree as to a verdict on Count II of the Information.

In all three cases cited by the Appellant in support of his contention that the Court erred in failing to poll the jury as to its inability to agree and discharging the same without the consent of the defendant, the factual circumstances are at variance with those of the instant case. In addition, it should be added that each of the cases cited, discussing the circumstances that would permit the judge to exercise his discretion to discharge a jury without the consent of the defendant, the circumstance of the failure of the jury to agree on a verdict is included.

In *Green v. United States,* 355 U.S. 184, 78 S. Ct. 221 (1957), which the Appellant feels ought to be controlling, the facts related to a first conviction of a lesser included offense and, when remanded, the defendant was placed on trial a second time for the greater offense. The conclusion of the Court related to double jeopardy, but, in discussing circumstances which would permit a retrial, the Court included the circumstance wherein the jury is unable to agree. The quotation from the case appearing in Appellant's Brief (p. 10) is sufficient to illustrate the point:

> ". . . At the same time *jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where unforeseeable circumstances . . . arise during (the first) trial making its completion impossible, such as the failure of a jury to agree on a verdict . . .*" (emphasis supplied)

Likewise, in *U.S. v. Tateo,* 216 F. Supp. 850, (N.Y. 1963), the facts are different, and the conclusion related to a question of double jeopardy in a circumstance where the trial was terminated prior to the time it was received by the jury. However, the Court specifically quotes with favor the general rule, as announced in *United States v. Perez,* 9 Wheat. 579, 6 L. Ed. 165 (1824), applicable to the circumstances under which a jury may be discharged without consent of the defendant.

In *Downum v. United States,* 300 F.2d 137 (CA 5th, 1962), the Court refers to *Gori v. United States,* 367 U.S. 364, 81 S. Ct. 1523 (1961), as stating the

> ". . . sound reasons for the termination of the current trial proceedings which will invariably result in the discharge of one jury with the expectation that another one will be chosen at a subsequent proceeding."

Such sound reasons, as set forth in the *Gori* case, *supra,* include the disagreement of the jury. There the Court said,

> ". . . There are occasions when a second trial may be had, although the jury was discharged without reaching a verdict and without the defendant's consent. Mistrial because the jury was unable to agree is a classic example; and that was the critical circumstance in *U.S. v. Perez,* 9 Wheat. 579, 6 L.Ed. 165; *Logan v. U.S.,* 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429; *Dreyer v. People of State of Illinois,* 187 U.S. 71, 23 S.Ct. 28, 47 L.Ed. 79; *Moss v. Glenn,* 189 U.S. 506, 23 S.Ct. 851, 47 L. Ed. 921; *Keerl v. State of Montana,* 213 U.S. 135, 29 S.Ct. 469, 53 L.Ed. 734."

4. The Court permitting the partial jury to separate while additional jurors were summoned.

In the second trial of the Appellant, the jury panel was exhausted before a complete jury of twelve persons was selected. The judge, after admonishing the selected prospective jurors not to discuss the case or to permit others to discuss it with them, allowed them to go to their respective homes. The prospective jurors were given instructions to return in one week. When the court reconvened as to this case, additional necessary jurors were selected, the entire jury was sworn and the trial proceeded.

The Appellant has advanced no unusual circumstances as to why, under the conditions that existed, the prospective jurors should not have been permitted to separate nor has he shown that they would have been exposed to any corruptive or prejudicial influence during the time they were separated through necessity.

In the absence of a showing of exceptional circumstances for the necessity of keeping the jury together, or that they would be subject to influences prejudicial to the Appellant, the question of whether the jury may be separated appears to be within the sound discretion of the court, employed with suitable safeguards.

In *Holt v. United States,* 281 U.S. 245, 31 S.Ct. 2 (1910), the Court denied that the mere opportunity for prejudice or corruption was sufficient to raise the presumption that they exist. Applying this rule, the Courts have consistently held that the matter of the separation of the jury is within the sound discretion of the trial judge. *Kleven v. U.S.,* 240 F.2d 270 (CA 8th, 1957); *McHenry v. U.S.,* 276 F. 761 (DC Cir., 1921); *Lucas v. U.S.,* 275 F. 405 (CA 8th, 1921), and *Brown v. U.S.,* 99 F.2d 131 (DC Cir., 1938), cert. denied 305 U.S. 562, 59 S.Ct. 97.

Thus, in *Coppedge v. U.S.,* 272 F.2d 504 (DC Cir., 1959), where the Court recessed from Thursday until Monday, the Court found favor in the rule cited in the *Brown* case, *supra,* (where the jury was permitted to separate overnight, on two occasions, and on a weekend)

> ". . . Under modern conditions, juries are permitted to separate, even over weekends, and unless

> there be exceptional circumstances, they should be permitted to do so . . ."

subject to the following conditions:

> ". . . in all criminal cases whenever jurors are permitted to separate, the Court should invariably admonish them not to communicate with any person or allow any person to communicate with them on any subject connected with the trial, and not to read published accounts of the trial . . ."

A case most similar in circumstances to the instant case is *United States v. Cornett,* 142 F.Supp. 764 (Ky., 1956), affirmed 245 F.2d 118 (CA 6th, 1959), wherein the judge advised the unsworn jury it would not be sworn that night and permitted it to separate until the following morning.

Consequently, it is submitted that where there is an absence of compelling reasons for keeping the jury together, the jury has not been sworn, nor even completely chosen, and the Court has admonished the prospective jurors not to discuss the case or permit others to discuss it with them, the exercise by the Court of its discretion to permit the jurors to separate was proper and no inference of prejudice to the Appellant may attach in the absence of a showing thereof.

II

PRINCIPLES OF DOUBLE JEOPARDY DO NOT OPERATE TO BAR RETRIAL ON ISSUE OF GUILT OF A SEPARATE OFFENSE.

The subsequent trial upon Count II of the Information was not barred by principles of double jeopardy when the jury in the first trial had agreed on Count I and had been unable to agree on Count II, and the Court had thus declared a mistrial as to Count II.

As stated above, Appellant was charged with two counts: The first count for Burglary and the second count for Grand Theft arising from the same acts. Appellant contends that the Court lacked jurisdiction to try the charge of Grand Theft after the acquittal of the charge of Burglary.

Such a contention flies in the face of all the principles of double jeopardy. Certainly the mistrial itself does not create double jeopardy. This was considered by the United States Supreme Court in *Gori v. United States, supra,* a decision on a case in which Gori had been prosecuted for receiving and possessing stolen goods. During presentation of the Government's case, the Court declared a mistrial *sua sponte* without consent of the defendant who was retried and claimed double jeopardy at the second trial. The Court quoted with approval cases holding,

> "The double jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment."

The Court said,

> "Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection and he may be retried consistently with the Fifth Amendment. Simmons vs. United States, 142 U.S. 148; Logan vs. United States, 44 U.S. 263."

Even the dissent in the *Gori* case, while maintaining contrary to the majority that the Court in these particular circumstances should not have declared a mistrial, recognized inability of a jury to agree as a legitimate example of proper dismissal of a jury without jeopardy attaching. This is what we are considering here.

But Appellant seems to believe jeopardy attaches here merely because a verdict was received in the first trial on the first Count regardless of what happened to the second Count. We submit this would only be true if the counts were identical or included offenses or so identical as to estop the Government from determination of the second issue after a jury had decided the first. And this is what Appellant's cited authorities hold.

Since the two charges, Burglary and Grand Theft, are separate and distinct offenses, it cannot be argued Appellant was tried twice for the same offense. Burglary requires (1) entry of a building with (2) intent

to commit a felony. Grand Theft requires (1) theft of property (2) of a value in excess of $50.00.

The elements of the two crimes are obviously distinct and separate and one could be found guilty of the one offense and not guilty of the other, or guilty or not guilty of both offenses.

It is not disputed that the evidence was substantially the same in both trials. But this is not the issue in a claim of double jeopardy. The issue is whether the same evidence is *necessary* in both charges. As stated by the 2d Circuit Court in *United States v. Kramer,* 289 F.2d 909 (CA 2d, 1961), cited by Appellant,

> "Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the 'same' only when the evidence *required* to support a conviction upon one of them (the indictments) would have been sufficient to warrant a conviction upon the other." (emphasis supplied).

As already noted, the evidence "required" for Burglary is entirely different from that "required" for Grand Theft. On the other hand, the same evidence may properly be used to prove many crimes.

Even in the case of *Sealfon v. United States,* 332 U.S. 575, 68 S.Ct. 237 (1948) the case most referred to in Appellant's Brief in connection with this issue as well as res judicata, the Court was not disturbed by the possibility of double jeopardy in the two trials. In this connection, it should be noted that the criminal

offenses charged in the *Sealfon* case were conspiracy to commit an offense and commission of the offense itself. Nevertheless, the Court held these were separate and distinct offenses and thus a person may be prosecuted for both.

We have no quarrel with authorities cited by Appellant in his attempt to prove twice in jeopardy as a result of the second trial. Appellant cites cases which held either that once having been acquitted for an offense the defendant may not be retried for the same offense or, as in *Ex Parte Nielsen* (Appellant's Brief, page 18), argues that an acquittal or conviction bars prosecution for any offense included within the offense for which the defendant was convicted or acquitted. Neither situation exists here since Appellant was not retried for the offense of which he was acquitted nor is the offense of Grand Theft an included offense within Burglary.

Further authority for the proposition that disposition of separate offenses charged in the same indictment does not give rise to a plea of once in jeopardy upon disposition of one of them, is found in the recent case of *United States v. Goldman,* ..... F.2d ..... (CA 3d, 1965). In that case, the defendant during his trial on two counts of an indictment, pleaded guilty on one count. The trial then proceeded and the jury found him guilty of the other count. The counts charged different offenses arising from the commission of a single wrongful act. The Court held the defendant was not placed in double jeopardy by his plea of guilty to one count and subsequent conviction upon another.

A similar holding in a case more nearly analogous to the procedural situation here is found in *Cosgrove v. United States,* 224 F.2d 146 (CA 9th, 1954). There, defendant was charged with conspiring to avoid tax penalties and violating 18 U.S.C. 1001, and aiding and abetting the preparation of a fraudulent return. The "aiding and abetting" charge described a substantive offense under the tax laws, and not the status of defendant as a principal under Title 18, United States Code, Section 2. Cosgrove was acquitted of the former, the jury disagreed on the latter, for which he was retried. In discarding the plea of former jeopardy the court noted former jeopardy involves an "identity of offenses." It then applied res judicata, the significance of which will be discussed hereafter. But the retrial was upheld as to the plea of former jeopardy.

III

THE RETRIAL UPON THE SECOND COUNT WAS NOT BARRED BY PRINCIPLES OF RES JUDICATA.

Throughout most of Appellant's arguments in his Brief are references touching upon principles of res judicata. In any discussion of res judicata, primary reliance must be placed on *Sealfon v. United States, supra,* which is the most recent authority on the subject of res judicata in criminal cases. In the *Sealfon* case, the Court held, on the basis of a particular fact situation, that the earlier acquittal on a conspiracy count of one indictment precluded a subsequent conviction on a substantive count of another indictment.

It is apparent from this and other cases that a prior judgment of acquittal for one offense is not a bar to a trial for another offense, although it may create an estoppel as it did in the *Sealfon* case. Thus, the prior determination may be pleaded as the defense in the second trial. The *Sealfon* case must be distinguished from the instant case, however, because here, Appellant was charged with two separate substantive offenses in which proof of a single fact was not essential to both. The facts of the *Sealfon* case indicate, on the other hand, that the defendant could not have been guilty of one if he were innocent of the other.

Appellant eagerly emphasizes in his Brief that no issue of conspiracy is involved here. We certainly agree. For if the acquittal had been a conspiracy and the conviction of the substantive, the particular facts of this case might have brought us under the *Sealfon* doctrine. We also contend that the acquittal of Burglary is not determinative of the issue of Grand Theft, unless there had been no evidence of theft apart from the evidence of Burglary. For whether one issue is determinative of the other, as stated in the *Sealfon* case, "Depends upon the facts adduced at each trial and the instructions upon which the jury arrived at its decision of the first trial."

In the *Cosgrove* case, *supra,* res judicata was applied, the Court holding,

> ". . . the issue of conspiracy and that of aiding and abetting are so nearly identical as to give rise to the defense of res judicata in favor of Cosgrove."

But the Court made clear the prior judgment (Acquittal of conspiracy)

> ". . . is conclusive between the parties only as to matters actually litigated and *determined by the judgment.*" (Emphasis supplied)

The Court then analyzed the *Sealfon* case as preventing a conviction of aiding and abetting following an acquittal for conspiracy, because proof of the latter required proof of ". . . an agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former case to be non-existent."

In the instant case, on the other hand, it was never adjudicated at the first trial whether appellant had committed theft; the jury was unable to decide that issue. It was decided only that he had not committed burglary.

To the same effect is *Kramer v. United States,* discussed, *supra.* Defendant was tried under charges of four counts, including two of conspiracy to rob two post offices, one of conspiracy to receive stolen property and one of receiving stolen property. He had previously been acquitted of charges that he committed the robberies. The Court said,

> "Application of the principle (of res judicata) has two phases. The first is to determine what the first judgment determined, a process in which, as the Sealfon case makes plain, the Court must look not simply to the pleadings but to the record in the prior trial. The second is to examine how that determination bears on the second case . . ."

"The issue was not whether 'jobs' had been done, but by whom."

The Court then noted that the judge had charged the Jury that it was not necessary defendant personally did every act constituting the offense charged. It was enough, under the aiding and abetting statute, that he wilfully participated therein.

Similarly, that there was a theft in the instant case was not disputed. The issue was who was responsible. Evidence of the activities giving rise to the charges came from the testimony of John Michael Wansor, a Navy man who apparently turned to crime in his spare time. Pursuant to local law, Wansor was not tried with his co-actors, including Appellant, but by Court-Martial where he had been convicted prior to the trial of Appellant.

In his testimony (T.R. pp. 272 to 317), Wansor relates being at Appellant's home the night the offenses were committed. Present were Appellant and his co-defendants, Mantanona and Ward. Three trips were made to the warehouse area, thefts occurring each time. He tells of leaving Appellant at the house and proceeding in Appellant's truck to the site of the theft. A substantial amount of property, including large spools of copper and steel wire, from the warehouse yard outside the fence were loaded onto Appellant's truck and returned to his house where they were unloaded. There followed, a short time later, a second trip to the warehouse, again in Appellant's truck. On this occasion, the fence was cut, the truck driven in-

side, and spools of wire and other items taken from the yard were loaded on a truck belonging to the contractor. This truck, together with Appellant's, was driven back to Appellant's and unloaded. Wansor's testimony, then, is significant evidence of Appellant's knowledge, complicity and direction of the operation (T.R., p. 286, Lines 1 through 26; p. 287, Line 1):

"Q. . . . What did you do when you arrived at Mr. Tolan's house?

A. Unloaded the wire.

Q. If you know, was there any one there at Mr. Tolan's house when you arrived?

A. Mr. Tolan.

Q. What, if anything, did Mr. Tolan do when you arrived?

A. Mr. Tolan came out and saw the H & G truck and told us it was a stupid move to take the truck because you get into stolen, you know, stealing motor vehicles and that kind, and then he looked over the truck, took the tire off it, looked in the tool box and covered up the wire and told us to take the truck back.

Q. I see. Where was the wire located? You took it off the truck, is this correct?

A. Yes.

Q. Where did you put the wire?

A. Inside Mr. Tolan's house.

Q. And is it your testimony that Mr. Tolan covered up this wire?

A. Yes sir, he took the top out of the pickup.

Q. And is it your testimony that he took a tire off the H & G truck?

A. I am not positive Mr. Tolan took it off, I I know he said something about taking it off but I don't know who took it off.

Q. What, if anything, did the defendant, Tolan, say at this time? Did you have any conversation with him at this time?

A. Well, he said that the truck, 'Take the truck back to H & G,' that is about the extent of the conversation."

Note how that testimony coincides with that of the ompany manager that wire had been taken from the ard (T.R., p. 246, Lines 19 through 26):

"A. . . . That was a reel that was missing.

Q. How many feet did that reel originally have?

A. I believe that was a full reel that had that many feet to begin with.

Q. That reel had 1585 feet of wire. Did you see that reel on Saturday yourself?

A. The reel had been in the yard. I didn't—I saw all the reels. I didn't particularly pick one out."

The third trip contains evidence of property stolen rom the warehouse building itself. Once more, Wanor's testimony shows knowledge on the Appellant's art of what was taking place. Appellant's reaction o the entry of the building was negative, to be sure nd this may have influenced the jury on the burglary harge, but his objection to what the other persons ad done was one of form and not substance. Nowhere n the testimony can be found any objection by Appellant to the use of his vehicle and his premises in he commission of the thefts. On the contrary, his omplicity is apparent throughout the evidence of that

night through the following days when Appellant proceeded to dispose of the property (T.R., p. 289, Line 26; p. 290, Lines 1 through 19):

"A. . . . Well, he looked over some stuff we had in the truck and then he said that it was a stupid move to break into the warehouse because that would give us a burglary on top of that, if they caught us for stealing.

Q. What did you do next?

A. I slept.

Q. How long did you sleep?

A. Not very long, maybe an hour, hour and a half.

Q. How was the truck unloaded that you brought back to Mr. Tolan's house?

A. Everybody just brought something and brought it in the house.

Q. Who was everybody?

A. Mr. Ward, Mr. Mantanona and myself.

Q. Did Mr. Tolan help you?

A. I don't believe so.

Q. Where did you put the things you unloaded from the, from Mr. Tolan's truck?

A. In Mr. Tolan's house, all except some wire we left upon the truck."

(T.R., pp. 307, Lines 1 through 6):

"A. . . . Oh, it was in line with Mr. Tolan's objections about breaking into the warehouse and that he said, as I recall, something about it was a foolish move because it would be another charge in case anybody got caught, and then I believe he said he wasn't worried because all they could get him for was as a fence for the stolen property."

The amount of wire taken which was cut up for sale at Appellant's instigation is described by Wansor on cross-examination (T.R., p. 312, Lines 21 through 24):

"Q. . . . How many rolls of wire was cut up?
A. I believe three.
Q. And all put in one drum?
A. Yes, sir."

Appellant's participation in these acts is verified by witnesses Tenorio, Pangelinan, and Terlaje (T.R., pp. 317 through 350), and in fact, Appellant admitted to the sale of the stolen transit and that he endorsed the check received as payment to the Agent of Naval Intelligence, Mr. Tannehill (T.R., pp. 352, Lines 23 through 26; p. 353, Lines 1 through 4):

> "A. . . . I asked him if a transaction occurred in his home involving the sale of a surveyor's transit and he answered that 'Since you already know that you have uncovered two witnesses, that there would be no point in my denying it.' I showed him his signature upon the back of this check and asked him if that was his signature . . . He said it was."

The evidence was clearly sufficient to enable the jury to find Appellant guilty of Grand Theft as a principal within the meaning of Title 18, Section 2, United States Code, even though he was not present in the commission of the theft.

Appellant's Brief indicated distress at the fact that Appellant was found guilty of the offense of Grand Theft even though he did not participate directly in the acts constituting the theft.

Appellant himself apparently operated under the same misconception of the law at the time of the offense for on two occasions, after Appellant found the contractor's truck had been stolen and when he found the warehouse had been entered, he objected and in each instance related that, of course, he could not be held for what they did but only as a receiver or "fence" of stolen property. Such a belief fails to take into account Title 18, United States Code, Section 2.

CONCLUSION

The record of the trial suffices to show that the procedural complaints of the Appellant were without substance; joining him with a co-defendant who was co-actor in the transaction was proper under the circumstances, as was the discharge of the jury without his consent when it could not agree on a verdict, and permitting a group of persons who were prospective jurors to go to their homes while additional talesmen were called. Such acts were within the discretion of the Court and Appellant has been unable to show anything other than that the discretion was well exercised, and within the limits placed upon it by prior judicial decisions.

Even in the matter of the prejudicial question to the defense witness, Palen, the Appellant has demonstratively failed to show that he was prejudiced in the conduct of his defense or that the response of the Court to the situation could not and did not effectively remove any presumption of improper influence on the

jury as to the Appellant. Certainly, this is more than true when he was convicted in a second trial that was completely free of any lingering taint that may have existed in the first trial. Therefore, the records substantiate that the trials of the Appellant met reasonable standards of fairness.

It has been further shown that the Appellant may not rely upon the principles of double jeopardy and res judicata in seeking reversal of his conviction. The well-settled rules pertaining to double jeopardy and res judicata do not encompass the situation where the offenses are separate and a jury, by reason of its failure to agree on a verdict, was discharged and the Appellant retried on the unresolved charge. The tortuous application of the principles of the cases cited by the Appellant to the facts of his case can lead only to the conclusion that he is outside of their purview.

Therefore, it is submitted that, based upon the record and the state of the law as it now exists, the conviction was proper and should be affirmed.

Dated, Agana, Guam,
December 20, 1965.

JAMES P. ALGER,
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District of Guam,
BENJAMIN H. KELLY,
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District of Guam,
Attorneys for Appellee.

Certificate of Examination of Rules

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

James P. Alger,
United States Attorney,
District of Guam,
Attorney for Appellee.

(Appendix Follows)

Appendix.

Appendix

STATUTES INVOLVED

Penal Code of Guam

Section 459. Burglary defined. Every person who at any time enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel or any underground portion thereof, with intent to commit grand or petit theft or any felony is guilty of "burglary."

Section 484. Theft defined. Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, . . .

Section 487. "Grand theft" defined. "Grand theft" is theft committed in any of the following cases:

(1) When the money, labor, or real or personal property taken is of a value exceeding $50.

(2) When the property is taken from the person of another.

United States Code

Title 18

Section 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes: . . .

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent

of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building. . . .

Section 13. Laws of states adopted for areas within federal jurisdiction

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Title 28

Section 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.

Section 1294. Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . .

Title 48

Section 1424. District Court of Guam; jurisdiction; appellate division; rules of procedure

(a) There is created a court of record to be designated the "District Court of Guam", and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine . . .

(b) The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to section 2072 of Title 28, in civil cases; section 2073 of Title 28, in admiralty cases; sections 3771 and 3772 of Title 18, in criminal cases; and section 53 of Title 11, in bankruptcy cases; shall apply to the District Court of Guam and to appeals therefrom; . . .

RULES INVOLVED

Federal Rules of Criminal Procedure

Rule 8. Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.